PP

v.

GUNUS SAGENA

COURT OF APPEAL, PUTRAJAYA
CLEMENT SKINNER JCA
LIM YEE LAN JCA
ROHANA YUSUF JCA
[CRIMINAL APPEAL NO: S-05-431-2010]
7 NOVEMBER 2013

CRIMINAL LAW: *Penal Code - Section 304(a) - Culpable homicide not amounting to murder - Reduction of charge from s. 302 Penal Code - Appeal against - Whether trial judge erred in her decision that accused had proven defence of grave and sudden provocation - Whether accused failed to bring case within defence - Whether deceased uttered humiliating and degrading words to accused - Whether act of accused in attacking deceased spontaneous - Whether trial judge correctly evaluated evidence and applied right test - Whether sentence imposed on accused manifestly inadequate - Whether there were cogent reasons to disturb sentence imposed*

CRIMINAL LAW: *Murder - Defence - Grave and sudden provocation - Whether proved - Whether deceased uttered humiliating and degrading words to accused - Act of respondent in attacking deceased - Whether spontaneous with no time gap and cooling off period - Whether accused failed to bring case within defence - Whether trial judge correctly evaluated evidence and applied right test - Whether there were cogent reasons to disturb sentence imposed - Whether trial judge erred in her decision that respondent had proven defence of grave and sudden provocation - Penal Code, ss. 302 & 304(a)*

CRIMINAL PROCEDURE: *Sentence - Adequacy of - Appeal against - Murder - Whether defence of grave and sudden provocation arose - Factors considered - First time offender - Circumstances under which offence committed - Whether trial judge correctly evaluated evidence and applied right test - Whether there were cogent reasons to disturb sentence imposed - Whether sentence so manifestly inadequate as to justify appellate intervention*

The accused was charged for the murder of the deceased under s. 302 of the Penal Code. It was the prosecution's case that the accused had attacked the deceased and his wife with an axe. The pathologist who conducted the post mortem on the deceased testified that there were 12 injuries on various parts of the victim's

A body, which included stab wounds, abrasions and lacerations and confirmed that the injuries to the neck, chest and abdomen were the ones that had caused the death of the deceased. The High Court Judge held that there was more than ample evidence from the prosecution witnesses to connect the accused to the death of
B the victim from the injuries sustained during the attack. The accused, in his defence, submitted that on the day the incident occurred, the deceased had called out to him "Kamu sudah kentot ayam?"; the direct translation of that was "Have you had sex with the cockerel?" According to the accused, the deceased had uttered
C the same words for at least ten times and for the past five days prior to the incident. When the deceased uttered the same words on that fateful day, the accused had taken his samurai sword, went over to the deceased's house and slashed him on the stomach and neck. The accused submitted that he had no
D intention to kill the deceased and denied using the axe. The judge found that the accused had succeeded in proving, on a balance of probabilities, the defence of grave and sudden provocation on the day of the killing. The judge proceeded to reduce the charge from one of murder under s. 302 to that of culpable homicide not
E amounting to murder under s. 304(a) of the Penal Code. The accused was sentenced to 18 years' imprisonment commencing from the date of his arrest. Dissatisfied with the said decision, the appellant appealed. The appellant raised the following grounds, *ie,* that (i) the trial judge had erred in not calling upon the accused
F to answer to the charge of murder under s. 302 of the Penal Code when the evidence adduced by the prosecution at the close of the prosecution case was sufficient to prove, not just a *prima facie* case but beyond reasonable doubt, the charge of murder against the accused; (ii) the trial judge had erred in law and in fact
G when she decided that the respondent had proved the defence of grave and sudden provocation when, in view of the factual circumstances, the respondent had failed to bring his case at all within such a defence; and (iii) the sentence passed on the respondent was inadequate.

H

Held (dismissing appeal)
Per Lim Yee Lan JCA delivering the judgment of the court:

(1) The judge had narrated and made findings on the evidence of
I each prosecution witness, and had concluded that the evidence had passed the maximum evaluation test laid down in *PP v. Mohd Radzi Abu Bakar* to establish a *prima facie* case under s. 180(1) of the Criminal Procedure Code. The judge

went on to call the accused to give his defence "to the charge" which could only mean "the charge of murder under s. 302 of the Penal Code." Thus, the issue that the judge should have called upon the respondent to enter his defence to the charge of murder did not arise for consideration. The appellant had misconstrued the ruling of the judge at the close of the case for the prosecution and the circumstances under which she reduced the charge. (paras 24, 26 & 28)

(2) The judge had given cogent reasons as to why she had accepted the accused's evidence that there was a grave and sudden provocation from the deceased to cause his killing. The judge found that the accused had reached the end of his tether and final straw when he heard the same words being uttered on that fateful day, which in turn caused him to snap and run amok. There was grave and sudden provocation on that fateful day itself. Further, based on the reaction of the spectators in the public gallery whom she said "sniggered and laughed" when the words "kamu bersetubuh dengan ayam?" were uttered in court, the judge was not wrong in finding that the society in which the accused and the deceased live in found such words humiliating and degrading and would subject the accused to ridicule by people living in his society. There was also nothing wrong in the judge's findings that the act of the respondent in attacking the deceased was a spontaneous act and there was no time gap and no cooling off period between the time the accused was taunted to the time he went up to his house to get the sword and went over to the deceased's house. The High Court Judge had correctly evaluated the evidence and had applied the right test in determining whether there was grave and sudden provocation herein. (paras 46, 51-53)

(3) Considering that the accused was a first time offender and the circumstances under which the offence was committed, the sentence imposed on him by the trial judge was not so manifestly inadequate as to justify appellate intervention. The sentence passed on the respondent was almost the maximum sentence imposed in s. 304(a) before the amendment came into force. There was therefore no cogent reason for this court to disturb the sentence imposed by the judge. Thus, the High Court Judge did not err in law or fact when she reduced the charge against the respondent and convicted him for an offence under s. 304(a) of the Penal Code. (paras 63 & 64)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Tertuduh telah dituduh membunuh si mati di bawah s. 302 Kanun Keseksaan. Adalah kes pendakwaan bahawa tertuduh telah menyerang si mati dan isterinya dengan kapak. Pakar patologi
B yang melakukan bedah siasat ke atas si mati memberikan keterangan bahawa terdapat 12 kesan luka pada pelbagai bahagian tubuh mangsa, termasuk kesan tikaman, pelelasan dan pelecetan dan mengesahkan bahawa kesan luka pada leher, dada dan abdomen adalah penyebab kematian si mati. Hakim Mahkamah
C Tinggi mendapati bahawa terdapat keterangan memadai daripada saksi-saksi pihak pendakwaan untuk mengaitkan tertuduh dengan kematian mangsa daripada kecederaan yang dialaminya semasa diserang. Tertuduh, dalam pembelaannya, menghujahkan bahawa pada hari kejadian tersebut, si mati telah menjerit kepadanya
D "Kamu sudah kentot ayam?"; terjemahan langsung pernyataan itu adalah "Kamu sudah bersetubuh dengan ayam?" Menurut tertuduh, si mati telah menyebut kata-kata kesat yang sama sekurang-kurangnya sepuluh kali dalam masa lima hari sebelum hari kejadian. Apabila si mati menyatakan kata-kata yang sama pada
E hari kejadian, tertuduh telah mengambil pedang samurai, menuju ke arah rumah si mati dan telah mengelarnya di bahagian perut dan leher. Adalah hujahan tertuduh bahawa dia tidak mempunyai niat untuk membunuh si mati dan menafikan telah menggunakan senjata kapak. Hakim mendapati bahawa tertuduh telah berjaya
F membuktikan, atas imbangan kebarangkalian, terdapatnya pembelaan bangkitan marah besar dan mengejut pada hari pembunuhan itu berlaku. Hakim telah mengurangkan pertuduhan dari pertuduhan membunuh di bawah s. 302 kepada homisid salah yang tidak terjumlah kepada pembunuhan di bawah s. 304(a)
G Kanun Keseksaan. Tertuduh telah dihukum penjara 18 tahun bermula dari tarikh dia ditangkap. Tidak berpuas hati dengan keputusan tersebut, perayu merayu. Perayu membangkitkan hujahan-hujahan berikut, iaitu, bahawa (i) hakim bicara terkhilaf apabila tidak memanggil tertuduh untuk menjawab pertuduhan
H membunuh di bawah s. 302 Kanun Keseksaaan apabila keterangan yang dikemukakan oleh pihak pendakwaan pada akhir kes pendakwaan adalah memadai untuk membuktikan, bukan sahaja satu kes *prima facie* tetapi satu kes melampaui keraguan munasabah, pertuduhan bunuh terhadap tertuduh; (ii) hakim bicara
I terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa responden telah membuktikan pembelaan bangkitan marah besar dan mengejut apabila, memandangkan keadaan fakta,

responden telah gagal membawa kesnya ke arah pembelaan tersebut; (iii) hukuman yang dijatuhkan ke atas responden adalah tidak memadai.

Diputuskan (menolak rayuan)
Oleh Lim Yee Lan HMR menyampaikan penghakiman mahkamah:

(1) Hakim telah memberikan naratif dan membuat beberapa dapatan mengikut keterangan setiap saksi pihak pendakwaan, dan telah membuat kesimpulan bahawa keterangan tersebut telah lulus ujian penilaian maksimum yang telah dibentangkan dalam *PP v. Mohd Radzi Abu Bakar* untuk membuktikan satu kes *prima facie* di bawah s. 180(1) Kanun Tatacara Jenayah. Hakim juga telah memanggil tertuduh untuk mengemukakan pembelaannya "terhadap pertuduhan" yang bermaksud "pertuduhan bunuh di bawah s. 302 Kanun Keseksaan." Oleh itu, isu bahawa hakim harus memanggil responden untuk memasukkan pembelaan terhadap pertuduhan membunuh tidak timbul untuk pertimbangan. Perayu telah menyalahertikan keputusan hakim pada akhir kes pendakwaan dan keadaan yang mendorong hakim untuk mengurangkan pertuduhan.

(2) Hakim telah memberikan alasan-alasan yang meyakinkan mengapa beliau telah menerima keterangan tertuduh bahawa terdapat bangkitan marah besar dan mengejut daripada si mati yang menyebabkan si mati dibunuh. Hakim mendapati bahawa tertuduh telah sampai ke penghujung kesabarannya apabila dia mendengar kata-kata kesat yang sama disebut pada hari kejadian, yang telah menyebabkannya naik angin dan menjadi amok. Terdapat bangkitan marah besar dan mengejut pada hari kejadian. Selanjutnya, berdasarkan pada reaksi penonton di mahkamah yang telah "terdekih-dekih dan ketawa" apabila kata-kata "Kamu bersetubuh dengan ayam?" disebut di mahkamah, hakim tidak khilaf apabila mendapati bahawa masyarakat di kawasan yang diduduki tertuduh dan si mati mendapati kata-kata kesat itu adalah memalukan dan mengaibkan dan akan membuatkan tertuduh boleh diejek oleh orang-orang yang berada dalam masyarakat yang sama. Tiada juga kekhilafan dalam dapatan hakim bahawa tindakan responden menyerang si mati adalah tindakan spontan dan tidak terdapat jurang masa atau tempoh yang boleh meredakan kemarahan tertuduh di antara waktu tertuduh diejek dan waktu dia menuju ke arah rumahnya untuk mendapatkan pedang dan seterusnya pergi ke rumah si mati. Hakim

A Mahkamah Tinggi telah dengan betul menilai keterangan dan telah menggunapakai ujian yang betul apabila menentukan sama ada terdapat bangkitan marah besar dan mengejut.

(3) Memandangkan bahawa tertuduh adalah pesalah kali pertama
B dan keadaan di mana kesalahan itu telah dilaksanakan, hukuman yang telah dijatuhkan ke atasnya oleh hakim bicara bukanlah tidak memadai untuk mewajarkan campur tangan rayuan. Hukuman yang telah dijatuhkan ke atas responden adalah hampir dengan hukuman maksimum yang diperuntukkan
C di bawah s. 304(a) sebelum pindaan berkuatkuasa. Oleh itu, tiada alasan yang memadai untuk mahkamah ini mengganggu hukuman yang dikenakan oleh hakim. Dengan itu, Hakim Mahkamah Tinggi tidak khilaf dari segi undang-undang dan fakta apabila dia mengurangkan pertuduhan terhadap
D responden dan mensabitkannya atas kesalahan di bawah s. 304(1) Kanun Keseksaan.

Case(s) referred to:
Bala Matik v. PP [2006] 2 CLJ 229 CA ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
E *Che Omar Mohd Akhir v. PP [2007] 3 CLJ 281 FC* ***(refd)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***
Eng Thye Plantations Bhd v. Lim Heng Hock & Ors [2001] 4 CLJ 245 CA ***(refd)***
F *Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC* ***(refd)***
Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Shari Mohd Shariff [2005] 5 CLJ 439 HC ***(refd)***
G *PP v. Sui Hmong Lian [2011] 8 CLJ 903 CA* ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180(1), (4)
Evidence Act 1950, s. 103
Penal Code, ss. 300, 302, 304(a)
H Penal Code (Amendment) Act 2003, s. 6

For the appellant - Aslinda Ahad; DPP
For the respondent - Hamid Ismail; M/s Hamid & Co

I *[Editor's note: For the High Court judgment, please see PP v. Gunus Sagena [2010] 1 LNS 1413.]*

Reported by Suhainah Wahiduddin

JUDGMENT

Lim Yee Lan JCA:

Introduction

[1] We had earlier dismissed the appeal of the public prosecutor ("the appellant") against the decision of the learned High Court Judge at Tawau, who on 2 November 2010 had reduced the charge against the accused ("the respondent") from one of murder under s. 302 of the Penal Code to culpable homicide not amounting to murder under s. 304(a) of the Penal Code. We now give our reasons for our decision.

[2] The charge against the accused at the High Court reads as follows:

> That you, on 8th August 2007, at about 12.30 p.m. at Kampong Kongsi 8, Batu 5, Jalan Apas, in the District of Tawau in the State of Sabah, did commit murder by causing the death of ALIAS BIN SAPE, Male, 43 years, and that you have thereby committed an offence punishable under Section 302 of the Penal Code.

Facts

[3] The evidence adduced in the case for the prosecution shows that on 8 August 2007 at about 12.30pm, while the deceased and his wife ("PW7") were resting after lunch at a resting area beneath their house (called "kolong" in the local lingo) when the accused, whom PW7 knew as a fellow villager, came and attacked the deceased with an axe.

[4] In her testimony, PW7, the deceased's wife, said she saw the accused slashed the deceased's stomach. PW7 further testified that after the initial attack, her husband ran up the lane leading from their house, with the accused in hot pursuit. She herself had also run to hide in her neighbour's house, Puan Murni binti Paddu ("PW6") and remained there until the police came. This fact was confirmed by PW6 in her testimony before the court.

[5] PW7 also testified that she herself was injured on her shoulder when she tried to stop the attack. She had sought treatment from the hospital for her injury. PW7 also identified the axe and also a samurai sword which she said was also used by the accused to attack her husband, based on the photographs in exhibits (exhs.-P4(a) & (b)).

[6] The doctor who treated PW7, Dr Kuganeshvaran a/l Muniandy ("PW8"), confirmed that she suffered soft tissue injury to her right shoulder as a result of blunt force being applied there. However, PW8 noted that there were no bruises seen on the injured shoulder.

[7] A fellow villager of the victim and the accused, Encik Mohd Jahari bin Paita ("PW5"), who was at that time sending a passenger to the village, told the court that he investigated a commotion and found the victim who had collapsed but was still alive and sent him to the hospital. PW5 also said he called the police and was answered by Lans Corporal Eldie @ Redi bin Sah ("PW2").

[8] Lans Corporal Eldie (PW2) testified that he went to the scene and found the accused standing near his house holding a samurai sword in his hand. PW2 identified the samurai sword from the same photograph marked as exh.-P4(b). The accused surrendered himself to PW2 who also seized the sword from the accused's hand.

[9] Another villager, Encik Zainudin Pasinring ("PW3") testified that he found the axe on the ground of the scene and identified the axe from the photograph marked as exh.-P4(a). PW3 said he took the axe and handed it over to the headman of their village, En Amat Wagiman (PW4) who handed it over to the police the next day.

[10] The pathologist ("PW10") who conducted the post mortem on the deceased said in her testimony that there were 12 injuries on various parts of the victim's body, which include stab wounds, abrasions and lacerations. PW10 confirmed that the injuries to the neck, chest, and abdomen were the ones that had caused the death of the deceased.

[11] According to PW10, the injuries to the neck, chest and abdomen caused injuries to the internal organs resulting in bleeding. The one on the neck penetrated the jugular vein, the wound on the chest cut the ribs and the left lung. The wound on the abdomen cut the tenth and 11th ribs of the diaphragm and parts of the liver. These three stab wounds were fatal and chances of survival were slim. PW10 certified the cause of death as hypovolaemic shock due to excessive loss of blood.

[12] PW10 also explained to the court that since the wounds to the neck, chest and abdomen had been surgically extended and the original size of the wounds altered, she was not able to comment on the weapons used in inflicting the wounds. She was able to say, however that the wounds were consistent with having been caused by a weapon like the samurai sword shown in the photograph marked as exh.-P4(b), whereas the injury to the head can be caused by either weapon.

[13] The chemist (PW9) testified that he had analysed the sword and the axe and the result shows that the blood stains found on the sword and axe matched the DNA of the deceased.

The High Court Decision

[14] At the close of the case for the prosecution, the learned High Court Judge held that there is more than ample evidence from the prosecution witnesses to connect the accused to the death of the victim from the injuries sustained during the attack. The evidence, in her view, withstand the maximum evaluation test as required by the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. The accused was then called to enter his defence to the charge.

The Defence

[15] The accused elected to give evidence under oath. He was the only witness for the defence. The accused said that on the day in question he was working at his 'kolong' building a room there, when the deceased passed by him and called out to him, "Kamu sudah kentot ayam?"; the direct translation of that is "Have you had sex with the cockerel?"

[16] According to the accused the deceased had uttered the same words for at least ten times and for the past five days prior to the incident. When the deceased uttered the same words on that fateful day, he went straight up to his house, took the samurai sword, went over to the deceased's house, which was just ten feet away from his own house, and slashed him on the stomach. When the deceased ran, he pursued him and again slashed him on the neck. The accused said he had no intention to kill the deceased – only to teach him a lesson not to use such foul language on him again. The accused said his intention was only to slash the victim's feet but the samurai cut the victim's stomach instead.

[17] The accused denied using the axe even though he admitted that it was underneath his house. When asked by the learned Deputy Public Prosecutor how bloodstains of the deceased could be found on it, he claimed that the villagers must have planted the evidence there as they hated him.

[18] The learned judge found such denial from the accused quite immaterial as the pathologist (PW10) herself was unable to say which of the two weapons was used to deliver the fatal blows. Furthermore, the accused himself admitted slashing the victim on his stomach and his neck – the two wounds which the pathologist mentioned (in addition to the wound to the chest) which caused the hypovolaemic shock leading to the victim's death. The only issue which is to be determined is whether he has succeeded in proving a defence of grave and sudden provocation.

[19] At the close of the defence's case, the learned judge found that the accused had succeeded in proving, on a balance of probabilities, the defence of grave and sudden provocation on the day of killing.

[20] The learned judge proceeded to reduce the charge from one of murder under s. 302 to that of culpable homicide not amounting to murder under s. 304(a) of the Penal Code. The learned judge explained that she chose s. 304(a) because in her assessment of his evidence and given the numerous slash wounds suffered by the deceased, the accused surely had the intention to cause such bodily injuries as were likely to cause the death of the deceased when he went amok on that day.

[21] After considering relevant factors on sentencing, the learned judge sentenced the accused to 18 years' imprisonment, commencing from the date of his arrest.

This Appeal

[22] Before us the appellant raised the following three grounds.

[23] It was first contended that the learned trial judge erred in not calling upon the accused to answer to the charge of murder under s. 302 of the Penal Code when the evidence adduced by the prosecution at the close of the prosecution case was sufficient to prove, not just a *prima facie* case but beyond reasonable doubt, the charge of murder against the accused.

[24] We disagree with this submission. We are of the view that the appellant has misconstrued the ruling of the learned judge at the close of the case for the prosecution and the circumstances under which she reduced the charge.

[25] This is what the learned judge said at pp. 7-8 of her judgment at the close of the case for the prosecution:

> A *Prima Facie* Case
>
> Based on the direct evidence of the victim's wife and the arrest of the accused soon after the attack on the victim with the sword which bore the blood stains of the victim and the discovery of the axe which similarly had the victim's blood stain near the accused's house, there is more than ample evidence to connect him to the death of the victim from the injuries sustained during the attack. **The evidence as I had narrated earlier had, in my view withstand the maximum evaluation** as required by the Federal Court in *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. The accused was thus called to give his defence to the charge. (emphasis added)

[26] The words "[T]he evidence as I had narrated earlier" in the above passage of the judgment refer to the first seven pages of her judgment in which the learned judge had narrated and made findings on the evidence of each prosecution witness, and had concluded that the evidence had passed the maximum evaluation test laid down in *Mohd Radzi Abu Bakar* to establish a *prima facie* case under s. 180(1) of the Criminal Procedure Code. Having so satisfied herself that the prosecution had established a *prima facie* case of murder, the learned judge went on to call the accused to give his defence "to the charge", which can only mean "the charge of murder under s. 302 of the Penal Code.

[27] The effect in law of the learned judge's findings at the close of the prosecution's case is that, had the accused remained silent when called upon to give his defence, he can at once be convicted of the charge of murder (see s. 180(4) of the Criminal Procedure Code and *Balachandran v. PP* [2005] 1 CLJ 85).

[28] Thus, the issue that the judge should have called upon the respondent to enter his defence to the charge of murder does not arise for consideration.

[29] The appellant next contended that the learned trial judge had erred in law and fact when she decided that the respondent had proven the defence of grave and sudden provocation when,

in view of the factual circumstances of this case and the law relating to such a defence, the respondent had failed to bring his case at all within such a defence.

[30] The defence of grave and sudden provocation is provided in Exception 1 to s. 300 of the Penal Code and reads as follows:

> 300. Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) ...
>
> (d) ...
>
> ...
>
> Exception 1 - Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> The above exception is subject to the following *provisos*:
>
> Firstly- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.
>
> Secondly- ...
>
> Thirdly- ...
>
> Explanation - Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact. (emphasis added)

[31] The case of *Bala Matik v. PP* [2006] 2 CLJ 229 was cited as authority that before the court can decide that there is a grave and sudden provocation, there needs to be evidence on record that there was provocation caused to the accused in the first place.

[32] The cases of *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 and *Che Omar Mohd Akhir v. PP* [2007] 3 CLJ 281 were next referred to in which the Supreme Court and the Federal Court were said to have laid down a number of tests to determine what is a grave and sudden provocation.

[33] In *Lorensus*, the Supreme Court held that the test of 'grave and sudden' provocation is, whether a reasonable man, belonging to the same class of society as the accused and placed in the situation in which the accused was placed, would be so provoked as to loose his self-control; that in determining what amounts to grave and sudden provocation the court may take into account the habits, manners and feelings or community to which the accused belongs, but not of the particular idiosyncrasies of the accused.

[34] In *Che Omar Mohd Akhir*, the Federal Court held that the question whether the provocation was grave and sudden such as to make the accused lose his self-control is a question of fact and not one of law. Each case is to be considered according to its own facts. The court must decide on the particular circumstances of that case whether the provocation was grave and sudden enough to permit an indulgent view of the crime committed by the accused. And the test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed, would be so provoked as to loose his self-control.

[35] The Federal Court in *Che Omar Mohd Akhir* also held that to successfully set up provocation as a defence in order to reduce the offence of murder to one of culpable homicide not amounting to murder, it is not enough to show that the accused was provoked into losing his self-control; it must be shown that the provocation was grave and sudden and must have by its gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased. In determining that question the court may also consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation.

[36] The facts in *Che Omar Mohd Akhir* were that the accused was convicted of the offence of murdering his wife. The accused set up the defence of grave and sudden provocation from his wife who had told him that she was unfaithful to him. The High Court, although finding that there was gradual provocation of the accused by the deceased, nevertheless dismissed his defence and convicted him of the charge of murder. The appellant's appeal to the Court of Appeal was also dismissed.

[37] At the Federal Court, it was argued that the appellant's act of killing was contributed by gradual and accumulated provocation, and was a reaction rather than an action committed in the heat of the moment. The Federal Court dismissed the appeal and held that the appellant was rightly convicted as he had failed to bring his case under the defence of grave and sudden provocation within Exception 1 to s. 300 of the Penal Code.

[38] In the course of its judgment, the Federal Court held, *inter alia*, that there is no such thing as a gradual and accumulated provocation that amounts to grave and sudden provocation. Devoid of its gravity and suddenness (as was the case there) a gradual and accumulated provocation is insufficient to constitute a defence under Exception 1 to s. 300 of the Penal Code. It follows that the provocative acts of the deceased there were not capable of constituting provocation sufficient to reduce the charge of murder to culpable homicide not amounting to murder. Further, the brutal retaliation by the appellant there was not proportionate to the provocation.

[39] Applying the tests laid down in the above authorities, the appellant submitted that based on the factual circumstances of the present case, the defence of grave and sudden provocation was not available to the accused to justify the reduction of the charge against him.

[40] Firstly, PW7 had flatly denied any provocation on the part of the deceased and there was no reason for the court to doubt her credibility concerning this. Secondly, adopting the reasonable man test in *Bala Matik* and *Lorensus*, the words allegedly used by the deceased that the accused had committed bestiality with a chicken were too trivial and could not in any sense cause any anger to the accused, what more a grave and sudden provocation.

[41] This submission is strengthened by the fact that during his evidence in chief at p. 111 ROA the respondent said that he had remained silent when the deceased uttered the alleged words. The fact that the accused remained silent shows that the words had no effect on him for otherwise he would have surely reacted straight away to the provocation.

Our Decision

[42] Alternatively, it was submitted that even if the words uttered by the deceased were sufficient to cause grave and sudden provocation to a person in the society in which the deceased and

the respondent live, as required by s. 103 of the Evidence Act 1950, this is a fact which the respondent must prove, but he had failed to do so.

[43] Thirdly, following *Che Omar Mohd Akhir*, there appears to be a cooling-off period between the time when the deceased uttered the alleged words and when the respondent reacted by attacking him. The accused said he had remained quiet when the alleged words were uttered by the deceased and had waited before finding for a weapon and then looking for the deceased before attacking him. Thus, the alleged provocation caused by the deceased ceased to be grave and sudden by reason that the respondent had time to reflect before making his move.

[44] Fourthly, following *Che Omar Mohd Akhir* the respondent's reaction to the alleged words uttered by the deceased was not proportionate in that he had acted in a brutal fashion as shown by the 12 wounds inflicted on the deceased which were on vital regions of the deceased namely his chest, abdomen and neck. It was contended that the accused's conduct was vicious and out of proportion to the alleged provocation from the deceased and a reasonable person in his position would not have acted in such a manner. The unreasonableness of the respondent's conduct was further proven by the fact that he had also attacked the deceased's wife, PW7, who had not provoked him in any way and was a totally innocent victim.

[45] We accept the authorities cited by the appellant (which were the same authorities cited by the learned judge in her judgment) as correctly stating the law on the defence of grave and sudden provocation. We do not however agree that there had been an incorrect assessment of the available evidence before her by the learned judge in arriving at her conclusion that there was grave and sudden provocation from the deceased which prompted his killing.

[46] A reading of her judgment shows that the learned judge had given cogent reasons as to why she accepted the accused's evidence that there was a grave and sudden provocation from the deceased to cause his killing. In fact, a reading of her judgment shows that the learned judge had dealt comprehensively with each of the points and issues raised by the appellant before us in this appeal.

[47] The following extracts from the relevant passages of the learned judge's judgment, and we quote, will explain why we say so:

(a) The burden on the accused to prove the defence of grave and sudden provocation is on a balance of probability: see *Che Omar Mohd Akhir v. PP* [1999] 2 CLJ 780 (CA);

(b) The test to determine the defence of grave and sudden provocation is "whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused would be so provoked as to lose his self control": see *Lorensus Tukan v. Public Prosecutor* [1988] 1 MLJ 251. In that case, George Seah SCJ further added that "what a reasonable man will do in certain circumstances depends upon the custom, manners, way of life, traditional value, etc. In short, the cultural, social and emotional background of the society to which an accused belongs;

(c) In every case, the Court must ask itself the question "Whether the accused was still deprived of his power of self control at the time of the killing": see *Chan Kwee Fong v. Public Prosecutor* [2010] 1 MLJ 441. In that case, Abdul Malik Ishak JCA held, following *Che Omar Mohd Akhir*, that "the longer the time gap between the provocative episode and the homicidal act, the more likely that it will be construed that the accused had killed due to premeditation or revenge";

(d) Applying the law as outlined above to the evidence before the Court, and bearing in mind that the burden of proof of the defence of grave and sudden provocation is only on a balance of probability, the Court finds that based on the evidence the accused has discharged his burden of proving on a balance of probability that the killing of the deceased was due to grave and sudden provocation from the deceased;

(e) The accused, who was a carpenter, was just a simple villager with no educational background. To be repeatedly mocked about committing bestiality by his own neighbour must have caused him to snap and made him lose control of his power of reasoning. It must be remembered that the mockery and the taunting were not just said once but repeated over five days and for no less than 10 times before the actual incident;

(f) The accusation of committing bestiality would, in the Court's view, subject the accused to ridicule in the society in which the accused lives in; and this is evidenced by the sniggering and laughter of the people in the public gallery when the words "bersetubuh dengan ayam" were uttered in Court. It

can be concluded that a very small section of the society in the public gallery had a common reaction of ridicule and incredulity when these words were uttered;

(g) The Court agrees that to be accused of bestiality is more damaging than, say adultery, to a simple villager like the accused because only a depraved person would commit such a thing. To accuse a man of the accused's simple background, or any other man for that matter, is surely a form of ultimate degradation, but to be taunted and mocked everyday about it by one's own neighbour made it worse;

(h) In the circumstances, the accused was justifiably enraged and that he was so was shown by his further action of calling out the victim's wife to come out from hiding and shouting to all and sundry to reveal themselves if they too thought he had committed bestiality. This commotion was corroborated in the evidence of PW5 who sent the victim to the hospital;

(i) The Court finds the provocation was indeed grave and sudden as was evidenced by the spontaneous act of the accused in going up to his house to get the sword and proceeding to the victim's house right after the latest mocking;

(j) There was very little time gap between the time the deceased uttered the impugned words to the time of the attack, for the accused had gone straight to his house to get the samurai sword and out again to the victim's house (which is just next to his as shown in the photographs Ex.-P3© and Ex.-P3(d));

(k) The evidence shows that the accused was deprived of his power of self-control when he attacked the deceased and his act of going up to his house to get the sword was a spontaneous act as he was consumed with the desire to teach the victim a lesson for his foul mouth. The element of premeditation or revenge was definitely not present.

Principle On Appellate Intervention

[48] It is trite law that an appellate court will not ordinarily disturb or interfere with the findings or decision of a subordinate court unless such findings are plainly wrong or there had been an insufficient judicial appreciation of the evidence before it (see: *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163, *Eng Thye Plantations Bhd v. Lim Heng Hock & Ors* [2001] 4 CLJ 245 and *Gan Yook Chin & Anor v. Lee Ing Chin*

A *& Ors* [2004] 4 CLJ 309). In order for an appellate court to disturb the findings and conclusions made by a trial judge, it must not merely entertain doubt whether his/her findings were right, but be convinced that they were plainly wrong.

B **[49]** Having gone through the record of appeal and the judgment of the learned High Court Judge in their entirety, we are not prepared to hold that the learned High Court Judge was "plainly wrong" in arriving at the findings and the conclusions she did. She had given reasons for her findings and conclusions. We find C her reasonings in arriving at those findings and conclusions were cogent and accord with the evidence. There was neither misappreciation of the law nor the evidence on the defence of grave and sudden provocation warranting our appellate intervention.

D **[50]** On the contention of the appellant that it was only the bare allegation of the respondent himself that the deceased had uttered the alleged words, which was flatly denied by his wife, PW7, we find the learned judge had made a specific finding that on the day in question the deceased did utter the words "kamu bersetubuh E dengan ayam?" to the accused. This can be seen at p. 12 at lines 16 to 28 and p. 13 at lines 1-2 of her judgment which reads as follows:

> The learned Deputy Public Prosecutor in her written submission F said it was only the words of the accused that the victim uttered this accusation – the victim's wife had flatly denied it. However, she has omitted to refer to the evidence of Lance Corporal Eldie (PW2) the policeman who arrested the accused shortly after the attack and whose evidence was that after the attack he found the accused standing placidly with the sword in his hands and when G he questioned him why he attacked the victim, the accused's answer was he was angry because the victim accused him of bestiality. This was a contemporaneous statement made by him and is to my mind sufficient corroboration of his defence when taken together with his demeanour after the attack as described H above. The same demeanour also accords well with his defence that the attack was spontaneous and his rage severe because after it was over, sanity returned and the accused was docile again.

[51] On the issue raised by the appellant that the provocation, if I any, from the deceased was a gradual and accumulated provocation, as found by the learned judge when she said the taunting and mocking occurred on ten previous occasions on the last five days, which therefore cannot in law amount to a grave and sudden provocation as laid down in *Che Omar Mohd Akhir*,

we find no basis in this submission. It is not the findings of the learned judge in this case that there was a gradual and accumulated provocation from the accused based on the ten previous occasions. Her findings were that the accused reached the end of his tether and final straw when he heard the same words being uttered on that fateful day, which in turn caused him to snap and ran amok. She found there was grave and sudden provocation on that fateful day itself. We are not prepared to say the judge was wrong in making such a finding. It is not for the court to speculate on the workings of the human mind as to why the accused did not react on the ten previous occasions but only the last occasion when the words were uttered.

[52] We also find that the learned judge was not wrong in making her own conclusion, based on the reaction of the spectators in the public gallery whom she said 'sniggered and laughed' when the words "kamu bersetubuh dengan ayam? (when the actual words used by the deceased in the local lingo "kamu sudah kentot ayam?" were much cruder) were uttered in court, that a small section of the society in which the accused and the deceased live in found such words humiliating and degrading and would subject the accused to ridicule by people living in his society.

[53] We also found nothing wrong in the learned judge's findings that the act of the respondent in attacking the deceased was a spontaneous act and there was no time gap and no cooling off period between the time the accused was taunted to the time he went up to his house to get the sword and went over to the deceased's house, which is just next to his house, to attack the deceased.

[54] As regards the appellant's contention that there was no reason for the accused to attack the deceased's wife, PW7, since the alleged provocation came from the deceased and not PW7, the learned judge had also addressed her mind on this matter at p. 11 of her judgment at lines 18 to 24 as follows:

> The accused, justifiably was enraged and that he was so was shown by his further action. After slashing the victim, he said he called out to the victim's wife to come out from hiding and shouted to all and sundry (as in his evidence) to reveal themselves if they too thought he had committed bestiality. This commotion was corroborated in the evidence of Encik Mohd. Jahari (PW5) who sent the victim to the hospital.

[55] The third ground raised by the appellant was on the adequacy of the sentence passed on the respondent under s. 304(a) of the Penal Code.

[56] The appellant contended that the sentence of 18 years imprisonment was manifestly inadequate, considering that an offence under s. 304(a) is a very serious offence and the fact that Parliament has deemed it fit to amend s. 304(a) in 2007 to enhance the sentence from 20 to 30 years (see *PP v. Sui Hmong Lian* [2011] 8 CLJ 903).

[57] The appellant also complained that the learned judge failed to take into consideration the public interest when passing sentence on the respondent (see: *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256 (HC).

[58] Having considered the factors taken into account by the learned judge before passing sentence of 18 years imprisonment, we are not prepared to say that the judge was wrong to pass the sentence she did on the respondent. We say so for the following reasons.

[59] It could be surmised from p. 75 of the appeal record that foremost on the mind of the learned judge before passing sentence on the respondent was the need for a deterrent sentence in view that the offence committed by him was a very serious one. She also took into account that a life has been lost as a result of the respondent's action as well as the suffering of the deceased's family in particular his wife and children in losing a husband and father.

[60] Before passing sentence, the learned judge also took cognisance of the learned DPP's submission that although s. 304(a) has been amended with effect from September 2007 to enhance the maximum sentence from 20 to 30 years, the maximum sentence that she could pass on the accused was only 20 years since the offence was committed by him in August 2007, which was about a month before the amendment took effect.

[61] As it turned out, both the learned DPP and the learned judge were wrong on the date of enforcement of the amendment to s. 304(a) of the Penal Code. A quick reference to the Penal Code (Amendment) Act 2003 (Act A1210), which *vide* s. 6 had increased the punishment in s. 304(a) from 20 to 30 years imprisonment, will indicate that the amendment came into force on 6 March 2007 *vide* PU(B) 67/2007.

[62] Be that as it may, we see no reason to interfere with the sentence passed by the learned judge on the respondent. It is an established principle that an appellate court will not interfere with the decision of a trial court on the question of sentence unless, (a) the trial court has proceeded on wrong principles; (b) there is a manifest error either in law or in fact in considering relevant facts and circumstances, or an omission to consider such facts and circumstances; or (c) the sentence was manifestly excessive or manifestly inadequate based on the proved facts and circumstances of the case; or (d) an essential principle of justice has been infringed in such circumstances as to occasion a substantial miscarriage of justice (see: *PP v. Shari Mohd Shariff* [2005] 5 CLJ 439).

[63] Applying the aforementioned established sentencing principles to the facts of this case, and considering that the accused was a first offender and the circumstances under which the offence was committed, we find the sentence imposed on him by the learned High Court Judge was not so manifestly inadequate as to justify our appellate intervention. In fact, we observe that the sentence passed on the respondent was almost the maximum sentence imposed in s. 304(a) before the amendment came into force. There is therefore no cogent reason for us to disturb the sentence imposed by the learned judge.

Conclusion

[64] In conclusion, having considered the submissions of the parties, and having read through the record of appeal, we unanimously find that the learned High Court Judge did not err in law or fact when she reduced the charge against the respondent and convicted him of an offence under s. 304(a) of the Penal Code. We find that the learned High Court Judge had evaluated the evidence correctly and applied the right test in determining whether there was grave and sudden provocation in this case. We accordingly find no reason to interfere with the decision of the learned High Court Judge and we dismissed the appeal against conviction.

[65] As regards the appeal against sentence, we do not find the sentence of 18 years to be manifestly inadequate in the circumstances of this case. We therefore dismissed the appeal against the sentence also.